ployee welfare benefit" plans. 29 U.S.C. §1002(1). The full scope of the statute has evolved as courts have determined whether certain employer-employee arrangements were covered by ERISA.

Of particular and obvious significance to this appeal is the issue of severance pay. Until 1985, it was unsettled in this Circuit whether a severance pay provision was a mere "payroll practice" outside the operation of ERISA or a "welfare benefit" plan covered by the statute. The question was clearly answered, however, in Holland, where we held that ERISA preemption did apply to disputes over severance pay. We further concluded that severance benefits could be denied if the failure to pay was not "arbitrary and capricious." 772 F.2d at 1148.

In light of Holland, there is no question but that if the claims of the former Warner-Lambert employees had arisen initially in the present litigation, they would have been subject to ERISA. The district court concluded, however, that in this instance an essentially equitable

doctrine of judicial procedure precluded the application of the federal statute. We disagree.

The law of the case doctrine is not an "inexorable command" but rather a prudent judicial response to the public policy favoring an end to litigation. White v. Murtha, 377 F.2d 428 (5th Cir. 1967).[4] Clearly, courts could not perform their duties "satisfactorily and efficiently . . . if a question once considered and decided . . . were to be litigated anew in the same case upon any and every subsequent appeal." Great Western Tel. Co. v. Burnham, 162 U.S. 339, 344 (1896). Accordingly, when a decision of an appellate court establishes "the law of the case," it "must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal . . . unless: (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3)

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[4] In Arizona v. California, 460 U.S. 605, 618 (1983), the Supreme Court observed that "law of the case is an amorphous concept . . . [that] directs a court's discretion, . . . [but] does not limit the tribunal's power."

the prior decision was clearly erroneous and would work manifest injustice." EEOC v. International Longshoremen's Assoc., 623 F.2d 1054 (5th Cir. 1980). Although the doctrine applies both to questions actually decided as well as to those decided by "necessary implication," it does not reach "questions which might have been decided but were not." Copra, Inc. v. Ward Foods, Inc., 567 f.2d 1316 (5th Cir. 1978).

We find but scant indication that any determination on the scope of ERISA was ever made in the Livernois litigation.[5] Certainly, as a totally separate and distinct issue, a ruling on ERISA was neither directly nor implicitly required in order for this Court to resolve the purely contractual issues raised in 1983.[6]

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[5] There is admittedly a brief reference to ERISA at Livernois, 723 F.2d 1152-53 n.6. That statement, however, merely expressed the mistaken assumption, later corrected in Holland, that ERISA did not apply to severance benefits.

[6] Appellees have repeatedly suggested in this appeal that they "won" the 1982-83 litigation. That is an overly-expansive view. If winning is defined as attaining a stated objective, then the Livernois plaintiffs certainly did not win, for they did not receive the severance benefits that they sought. Rather, this Court

Moreover, we cannot accept appellees' suggestion that Warner-Lambert's failure to assert federal preemption in the earlier case renders that default part of the law of the case. An omission may become part of the law of the case only if its subsequent assertion is an attempt to relitigate the ultimate issue previously decided. The ultimate, indeed the only issue, in Livernois, however, was contract. See Holland, 772 F.2d 1148 n.6. Appellant's present claim of preemption does not challenge this Court's previous analysis. Rather, appellant contends only that the rights of the plaintiffs must now be weighed in light of a hitherto unexamined legal doctrine.[7]

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held only that plaintiffs retained rights under their contractual arrangement with their former employer which might ripen into an enforceable claim. The possibility that some other unforeseen operation of law might bar the contractual claim was not addressed.

[7] Appellees' reliance upon cases such as Zdanok v. Glidden Company, 327 F.2d 944 (2d Cir. 1964), and Sorensen v. Pyrate, 65 F.2d 982 (9th Cir. 1933), is misplaced and illustrates their failure to appreciate this essential distinction in the law of the case doctrine. In Zdanok, the doctrine was invoked to prevent a defendant from

Even were we to assume for purposes of this appeal that Warner-Lambert's failure to assert ERISA in Livernois could be brought under the general rubric of law of the case, it would nevertheless be error to refuse to apply the statute in the present litigation. A judicially created procedural doctrine cannot defeat the intent of Congress. When Congress preempts state law, it gives concrete expression to the constitutional authority granted by the Supremacy Clause of Article VI. Louisiana Public Service Comm'n v. FCC, 106 S.Ct. 1890 (1986). The effect of a preemptive statute is, therefore, quasi-jurisdictional. A state court confronted with a dispute governed by a preemptive federal statute would have no authority to adjudicate the matter

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reopening on the basis of new evidence its liability for breach of contract after a remand for a determination of damages. Similarly, in Sorensen, a defendant who had relied unsuccessfully upon an interpretation of contract language defense was not permitted on remand to contest its liability for breach of contract on the new theories of deceit, nonexistence of subject matter and lack of mutuality. In this case, appellant's claim of preemption may be determined without disturbing the Livernois assessment of contract rights. Both Zdanok and Sorensen are therefore inapposite.

other than in accordance with the statute. Kalb v Feuerstein, 308 U.S. 433, 440 (1940). Certainly, a federal district court sitting pursuant to diversity jurisdiction has no greater authority.

We conclude, therefore, that it was error for the district court to refuse to apply the standards provided in ERISA when weighing the claims of the former Warner-Lambert employees to severance pay. It does not follow, however, that our decision in Livernois has been overruled or has no relevance to the reexamination of appellees' claims on remand. In determining whether Warner-Lambert's present refusal to pay benefits is arbitrary or capricious, the district court should consider the totality of the circumstances, including the nature of the original contractual relationship between appellant and appellees. The district court should also weigh the implication of Warner-Lambert's apparent acquiescence in the result reached in Livernois.[8]

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[8] In Hudson Transit Lines v. United States ICC, 765 F.2d 320 (2nd Cir. 1985), the court held that an employer who had failed to comply with ERISA reporting and disclosure requirements could not be estopped from asserting federal preemp-

We, of course, express no view with regard to the ultimate disposition of this matter. We are not convinced, however, that Warner-Lambert must automatically prevail simply because the claims against it must now satisfy the standards established in ERISA.

III.

For the foregoing reasons, the judgement of the district court is reversed and this matter is remanded for additional proceedings consistent with this opinion.

REVERSED AND REMANDED

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tion. The court held, however, that it was proper to consider whether the employer;s conduct had "tainted" the subsequent refusal to pay benefits, thereby rendering the refusal arbitrary and capricious. 765 F.2d 328-29. A similar consideration of Warner-Lambert's prior conduct would certainly be appropriate.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT COURT OF SOUTH CAROLINA

GREENWOOD DIVISION

Virginia M. Sejman, et al., Plaintiffs, vs. Warner-Lambert Company, Inc., Defendant.	)	C/A 9:85-1146-17
	)	O R D E R
Thomas H. Givens, et al., Plaintiffs, vs. Warner-Lambert Company, Inc. Defendant.	)	C/A 9:85-1698-17

These cases are before the Court upon motion of the defendant, Warner Lambert Company, Inc., (Warner Lambert) for summary judgment pursuant to Rule 56(b), Fed. R. Civ. P. Plaintiffs in both cases seek to recover severance pay from Warner Lambert. In an order entered on February 5, 1987, this court denied Warner Lambert's motion for summary judgment and determined that the Employee Income Security Act of

1974, 29 U.S.C. § 1001 et seq. (ERISA), would have no application to these actions, by reason of the failure of the defendant to plead ERISA in an earlier action involving some, but not all, of the parties to these actions. See Livernois v. Warner-Lambert Co., Inc., 723 F.2d 1148 (4th Cir. 1983). The court determined that its decision regarding the applicability of ERISA involved a controlling question of law as to which there was substantial ground for disagreement and permitted the parties to seek review of its decision pursuant to 28 U.S.C. § 1292(b). The United States Court of Appeals for the Fourth Circuit accepted the appeal. In a decision announced on April 18, 1988, the court of appeals reversed this court, determined that ERISA does apply to these actions, and remanded the case for further proceedings consistent with the opinion. Sejman v. Warner-Lambert Co., Inc., 845 F.2d 66 (4th Cir. 1988).

On remand, defendant has renewed its motion for summary judgment. Oral argument was heard on the motion on June 10, 1988. For the

reasons set forth below, the motion is granted.

Prior to January 20, 1982, all of the plaintiffs were employed by Warner Lambert in its Medical-Surgical Division in Greenwood, South Carolina (Cmptl. ¶ IV). On January 20, 1982, the Medical-Surgical Division was sold as a going concern to Professional Medical Products, Inc. (PMP). (Affidavit of Raymond M. Fino, sworn to May 10, 1988 ¶6). Following the sale, each of the plaintiff continued to work for PMP in the same jobs, at the same location, with the same seniority, at the same or higher salaries, and with fully comparable employee benefits (Deposition of C. Birge Sigety at 5).

The Sejman Plaintiffs: Except for plaintiff Glenda Idle who voluntarily retired from PMP after February 1, 1985, all of the Sejman plaintiffs have remained employed by PMP from the date of the sale up to the present time (Response to Request to Admit ¶ ¶ 17-18. During the course of their employment at PMP, PMP has made occasional changes in the configuration of its employee benefits package, sometimes enhancing various of

the benefits available and other times making certain cutbacks (Deposition of J. Lee Foltz at 30-31). Among other changes made over the years, PMP instituted a revised severance policy effective February 1, 1985 (Cmplt. ¶ XII). Overall, however, the level of employee benefits in place at PMP is still essentially comparable to that existing as of January 20, 1982 (Foltz Dep. at 30-31).

The Sejman plaintiffs contend that, effective February 1, 1985, they experienced "job elimination" within the meaning of the Warner Lambert severance policy, even though they continued to work for PMP in the same jobs following that date. They assert that the job elimination occurred automatically as a result of PMP's change of certain employee benefits, most notably the PMP severance pay policy. The Sejman plaintiffs seek an aggregate recovery of more than four hundred thousand and no/100 ($400,000.00) Dollars in severance benefits.

The Givens Plaintiffs: Each of the Givens plaintiffs was employed by PMP for more

than three (3) years after Warner Lambert's sale of the Medical-Surgical Division (Deposition of Thomas H. Givens at 4-5; Deposition of M. L. Brannon at 4-5; Deposition of John J. Caputo at 3-4; Deposition of Clayton E. Robinson, Jr. at 3). On March 8, 1985, plaintiffs John J. Caputo and Clayton E. Robinson were terminated by PMP purportedly for unsatisfactory work performance (Caputo Dep. at 29; Robins Dep. at 3, 6-7), and on April 19, 1985, plaintiffs Thomas H. Givens and M. L. Brannon were terminated by PMP due to alleged job elimination (Givens Dep. at 5-6; Brannon Dep. at 7).

Givens and Brannon received fifteen thousand five hundred seventy four and no/100 ($15,574.00) dollars and ten thousand eight hundred sixty eight and no/100 ($10,868.00) dollars, respectively, in severance pay from PMP in accordance with the severance policy then in effect at PMP (Cmplt. ¶ IX). Caputo and Robinson received no payment specifically denominated as severance pay from PMP, but in exchange for releases of "any and all claims for relief or

damages, arising out of or having any bearing whatsoever on the terms and conditions of [their] employment with Professional Medical Products, Inc., or [their] termination from Professional Medical Products, Inc.", they received payment of thirty thousand and no/100 ($30,000.00) Dollars and twenty five thousand and n0/100 ($25,000.00) dollars, respectively (Caputo Dep. at 8-8).

In accordance with the decision in Sejman, the standards provided in ERISA must be applied in weighing the claims of these former Warner Lambert employees to severance pay.

Judicial review of a denial of benefits under a plan covered by ERISA is narrowly limited to a determination whether the denial was arbitrary and capricious. Whipp v. Seafarers Vacation Plan, 832 F.2d 853, 857 (4th Cir. 1987); Holland v. Burlington Indus., 772 F.2d 1140, 1148-49 (4th Cir. 1985), cert. denied, 477 U.S. 903, aff'd mem. sub. nom., Brooks v. Burlington Indus., 477 U.S. 901 (1986); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985); LeFebre v. Westinghouse Elec. Corp., 747

F.2d 197, 204 (4th Cir. 1984). Where eligibility for benefits is at issue, primary responsibility for decision-making must rest with those who formulate and administer company policies and "whose experience is daily and continual, not with judges whose exposure is episodic and occasional." Berry, 761 F.2d at 1006; Holland, 772 F.2d at 1148.

Under the applicable arbitrary and capricious standard of review, the sole question is whether the decision reached "was made rationally and in good faith -- not whether it was right." Riley v. MEBA Pension Trust, 570 F.2d 406, 410 (2d Cir. 1977). It is not the court's task to substitute its judgment for that of the administrator or to determine whether the administrator made the best possible decision. Whipp, 832 F.2d at 856.

In reviewing a denial of severance benefits, courts have focused on four factors in determining whether the denial was arbitrary and capricious: (1) whether the challenged interpretation of the plan is fair and reasonable in

the context of the entire plan; (2) whether the challenged interpretation has been uniformly applied in similar situations; (3) whether the award of severance benefits would result in a windfall recover; and (4) whether the procedural requirements of ERISA have been so consistently and flagrantly violated that a substantive harm has been worked on the plan participants. E.g., Simmons v. Diamond Shamrock Corp., 844 F.2d 517 (8th Cir. 1988); Adcock v. Firestone Tire & Rubber Co., 822 F.2d 623 (6th Cir. 1987); Holland, supra; Anderson v. Ciba-Geigy Corp., 759 F.2d 1518 (11th Cir.), cert. denied, 474 U.S. 995 (1985); Jung v. FMC Corp., 755 F.2d 708 (9th.Cir. 1985); Sly v. P. R. Mallory & Co., 712 F.2d 1209 (7th Cir. 1983).

1. Fair and Reasonable Interpretation

Under the plain language of the Warner Lambert severance policy, eligibility for severance benefits depends upon two factors. First, the claimant must be a covered "employee," of Warner Lambert (Fino. Aff., Ex. B). Second, the claimant must have been "terminated by the

Company as a result of job elimination, work performance, or other reasons of Company convenience" in a circumstance not connected with a divestiture. (Fino Aff., Ex. B).

Plaintiffs' ineligibility for severance pay under the Warner Lambert severance policy is thus clear. First, in 1985 when their entitlement to severance pay allegedly arose, they were not employees of Warner Lambert and had not been employees of Warner Lambert for more than three (3) years. To the contrary, they were employees of PMP and were covered by the severance policy in effect at PMP.

Moreover, none of the plaintiffs were "terminated" by Warner Lambert "as a result of job elimination, work performance or other reasons of Company convenience." (Id.) There is no dispute that the terminations of the Givens plaintiffs were carried out by PMP without any involvement, or right of involvement, on the part of Warner-Lambert. Equally undisputed is the fact that none of the Sejman plaintiffs were "terminated" by anyone, much less Warner Lambert.

Each and every one of them continued to work at PMP on and after February 1, 1985 just as he or she had done for the past three years (Response to Request to Admit __ 17-18).

Warner Lambert's interpretation of its severance policy as denying benefits to individuals who do not satisfy either of the eligibility requirements unambiguously set forth in the severance policy is clearly fair and reasonable.

2. Consistent Past Practice

Neither the present Warner Lambert severance policy nor any of its predecessor has ever been interpreted or applied by Warner Lambert so as to afford benefits to individuals who were not employees of Warner Lambert or a corporate affiliate on the date of the event claimed to trigger entitlement to severance pay (Fino Aff. ¶ 5). In connection with more than fifty-five (55) divestitures over the course of more than thirty (30) years, Warner Lambert has never paid severance benefits to individuals who had the opportunity to continue working with the acquir-

ing company, even if those individuals were ultimately terminated by the acquiring company or encountered a reduction in fringe benefits after their employment with Warner-Lambert ceased (Fino Aff. ¶ ¶ 4-5).

Conformity with a uniform past practice of not paying severance benefits under comparable circumstances is accepted as an indication of the absence of arbitrary and capricious conduct. E.g., Schwartz v. Newsweek, Inc., 827 F.2d 879, 883 n.3 (2d Cir. 1987); Anderson, 759 F.2d at 1522; Jung, 755 F.2d at 713; Sly, 712 F.2d at 1213.

3. Windfall Recovery

In reviewing the denial of severance benefits under the arbitrary and capricious standard, courts have sustained interpretations which avoid windfall payments. E.g., Acton v. Tosco Corp., 815 F.2d 1161, 1163 (8th Cir. 1986); Jung, 755 F.2d at 714; Sly, 712 F.2d at 1211; Pabst Brewing Co. v. Anger, 610 F. Supp. 214, 217 (D. Minn. 1985), aff'd., 784 F.2d 338 (8th Cir. 1986). The plaintiffs, who are covered by their

current employer's severance policy, seek to recover supplemental severance benefits from a prior employer. Recovery of such benefits can fairly be described as a windfall.

4. Procedural Requirements

Since Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984), cert. denied, 474 U.S. 865 (1985), was decided, one of the factors considered in connection with judicial review of a denial of severance benefits is the failure to follow procedural requirements under ERISA.

In remanding this case, the Fourth Circuit Court of Appeals directed this court's attention to the question of whether the employer's failure to comply with ERISA reporting and disclosure requirements might "taint" the subsequent refusal to pay benefits, thereby rendering the refusal arbitrary and capricious. Sejman, 845 F.2d at 70, n. 8. It is this factor to which plaintiffs have devoted most of their attention on remand, setting forth certain procedural violations of ERISA. Memorandum of Plaintiffs in Opposition to Summary Judgment at

3-4.

In Blau, the Ninth Circuit reversed the lower court's grant of summary judgment in favor of Del Monte and held that Del Monte's "wholesale" and "flagrant" failure to comply with ERISA's reporting and disclosure requirements precluded a finding, as a matter of law, that its denial of severance benefits following the divestiture of a wholly owned subsidiary was not arbitrary and capricious. Blau, 748 F.2d at 2353.

In the years since Blau was decided, the case has repeatedly been distinguished by courts dealing with the same question of procedural non-compliance with ERISA, including the Ninth Circuit in a decision rendered just a week later, Jung, 755 F.2d at 714-15, and the Fourth Circuit in Holland, 772 F.2d at 1149-50. Indeed, since Blau, summary judgment has frequently been awarded in severance pay litigation in spite of a failure to have satisfied the procedural requirements of ERISA. E.g., Simmons, 844 F.2d at 524; Coleman v. General Elec. Co., 643 F.

Supp. 1229, 1241-42 (E.D. Tenn. 1986), aff'd., 822 F.2d 59 (6th Cir. 1987); DeAngelis v. Warner Lambert Co., 641 F. Supp. 467, 473 (S.D.N.Y. 1986); Acquin v. Bendix Corp., 637 F. Supp. 657, 664-65 (E.D. Mich. 1986); Pabst Brewing Co., 610 F. Supp. at 216. Unless the procedural dereliction is so egregious as to work a substantive harm, non-compliance with ERISA's procedural requirements does not render otherwise reasonable decisions arbitrary and capricious. See Gilbert v. Burlington Indus., 765 F.2d 320, (2d Cir. 1985), aff'd mem. sub nom., Roberts v. Burlington Indus., 477 U.S. 901 (1986).

The Blau case turned on the existence of a "wholesale and flagrant" "flout[ing]" of the procedural requirements of ERISA, evidence that the severance policy had been "actively concealed" from employees, and suggestions that the policy had been discriminatorily enforced such that senior executives fared better than lower level salaried workers. Plaintiffs have not and could not argue that these factors are present here. To the contrary, at his deposition,

Raymond F. Fino, Warner Lambert's Vice President, Human Resources, explained:

> All of our policies are disseminated via something that we call the policy manual. That is in the possession of all employees that supervise other employees. To that extent, the [severance] policy was disseminated. In addition, if any employees ask for a copy, they would be given a copy.
>
> * * *
>
> All employees are aware of the existence of the policy manual. They are encouraged to have discussions with their line supervisors, and beyond that, I would simply have to say that it's common knowledge by virtually all exempt employees of Warner Lambert that there is a severance policy. My years of experience would tell me most of the employees would have that knowledge.

(Fino Dep. at 12, 14). Consistent with Fino's testimony, plaintiff Givens stated in his deposition that Warner Lambert's severance policy was "well circulated" to employees, including himself, and that he was aware of the plan's existence, had a copy of the plan, and knew to whom any inquiries could be addressed from the time he first started working at Warner Lambert (Givens Dep. at 42-44). Similarly, plaintiff Robinson knew of Warner Lambert's severance policy, was familiar with its terms, and had a copy of the plan from the time he joined the company (Robi-

nson Dep. at 26-28). Finally, plaintiff Caputo had a copy of the severance policy "for years" and discussed it with personnel people in various capacities at Warner Lambert (Caputo Dep. at 43-44). Indeed, in view of the prior litigation over severance pay in Livernois, it is scarcely possible that employees of the Medical-Surgical Division could have been unaware of Warner Lambert's severance policy.

Whatever procedural violations with respect to ERISA may have occurred here do not approach the level of those in Blau, nor are they of the type envisioned by the Fourth Circuit in Sejman as potentially "tainting" the decision to deny benefits. The violations clearly worked no substantive harm on plaintiffs, and provide no basis for finding that it was arbitrary and capricious for Warner Lambert to have denied severance benefits in accordance with the language of its policy and unbroken past practice.

5. The Totality of the Circumstances

In addition to the foregoing traditional analysis under the arbitrary and capricious

standard, this court must undertake an additional analysis, made necessary by reason of the unique procedural history of this case. In the Livernois decision, the Fourth Circuit (applying state contract law because ERISA was not raised by the defendant in that action) fashioned a reasonable method for resolving the dispute that had not been directly advocated by either party. That is to say, the court held that Warner Lambert did bear a continuing contractual obligation toward its former employees, which would not ripen into an obligation to pay unless and until the successor employer directly or indirectly terminated their employment. In Sejman the Fourth Circuit directed that, on remand, this court should consider "the totality of the circumstances, including the nature of the original contractual relationship between appellant and appellees. . . [and] the implication of Warner Lambert's apparent acquiescence in the result reached in Livernois." Sejman, 845 F.2d at 70.

On remand, plaintiffs have not offered any significant reason why Warner Lambert's

"apparent acquiescence" in the outcome of Livernois should militate in favor of a finding that the ultimate decision on severance pay was arbitrary and capricious.

Warner Lambert points out that it has never acquiesced in an interpretation of its policy that affords benefits to individuals such as the plaintiffs in these cases. Shortly after the district court's unfavorable decision in the Livernois case, Warner Lambert amended its 1981 policy on severance pay to make it clear that severance benefits would not be available to an employee whose employment with Warner Lambert was terminated in connection with a divestiture if he or she had the opportunity to continued [sic] to work with the acquiring company. Moreover, as the "prevailing party" in the Livernois appeal, Warner Lambert had no occasion to challenge the route by which the Fourth Circuit reached the conclusion that the plaintiffs were not entitled to the severance benefits they sought.

Indeed, the Fourth Circuit's opinion in Livernois indicates that Warner Lambert's "a-

cquiescence" was lukewarm at best:

> The fact that, when the alternative approach was broached at oral argument, counsel for Warner Lambert indicated that it was something he was sure his client would find acceptable cannot be regarded as un unrestrained endorsement. Rather the handwriting was on the wall to the effect that the panel of the Court hearing the case had serious misgivings about the Warner Lambert "solution". Counsel was expressing a preference for half a loaf rather than none.

Livernois, 723 F.2d at 1155, n. 11.

In sum, Warner Lambert's acquiescence, such as it was, in the Livernois result, does not alter the result called for under the traditional arbitrary and capricious analysis set out above. This factor, considered in conjunction with all of the other circumstances present in this controversy, does not result in a finding that the decision to deny severance benefits to the plaintiffs was arbitrary and capricious.

For the foregoing reasons, it is hereby ORDERED that the motion of the defendant, Warner Lambert Co., Inc. for a summary judgment be, and the same hereby is, granted, and that this action is dismissed.

IT IS SO ORDERED.

Joe F. Anderson, Jr.
United States District Judge

Greenville, South Carolina

July 25, 1988